1989

Betty J. Maxwell v. Otis C. Maxwell : Brief of Appellant

Utah Court of Appeals

Franklin L. Slaugh; attorney for appellant.
Betty J. Maxwell; pro se.

IN THE UTAH COURT OF APPEALS

BETTY J. MAXWELL, Plaintiff and Respondent, vs. OTIS C. MAXWELL, Defendant and Appellant.	)	Case No. 890252-CA

Priority 14(b)

APPELLANT'S BRIEF

On Appeal from the Third Judicial District Court in and for Salt Lake County, State of Utah, Honorable Kenneth Rigtrup.

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Respondent, Pro Se

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APPELLANT'S BRIEF

JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal pursuant to Section 78-2a-3(2)(g), Utah Code Annotated (1953, as amended) and Rule 4(a) of the Rules of the Utah Court of Appeals. The proceedings below involved a Petition by the Respondent for an Order to Show Cause why the Appellant should not be ordered to pay or caused to be paid to Respondent one-half of his gross military retirement pay rather than one-half of the "disposable" retired pay which she had been receiving. The Domestic Commissioner recommended that the Respondent continue to receive one-half of the "disposable" retired pay. Respondent objected and the District Judge granted Respondent's Motion for Review and entered an Order requiring the Appellant to initiate an allotment from his military retirement pay that would result in one-half of the gross pay being paid to the

Respondent and further entered in judgment against the Appellant for $1,419.00.

ISSUES PRESENTED FOR REVIEW

The issue presented by this case is whether the Order of the Third District Court requiring that the Respondent be paid one-half of the Appellant's gross retirement pay violates the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408, et. seq., which provides that such payments may not exceed 50% of "disposable retired or retainer pay" as that term is defined therein.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS WHOSE INTERPRETATION IS DETERMINITIVE

The statute pertaining to this case whose interpretation is determinative is the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408 (a)(4) which reads as follows:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this Title) less amounts which- (A) are owed by that member to the United States; (B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by Court's Marshal, federal employment taxes, and amounts waived in order to receive compensation under Title 5 or Title 38; (C) are properly withheld for federal, state, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such a member claimed

all dependents to which he was entitled; (D) are withheld under Section 3402 (i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i)) if such a member presents evidence of a tax obligation which supports such withholding; (E) in the case of a member entitled to retired pay under Chapter 61 of this Title are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or (F) are deducted because of an election under Chapter 73 of this Title to provide an annuity to a spouse or a former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a Court Order under this Section."

Title 10 Section 1408 (d) (1) reads as follows:

"After effective service on the Secretary concerned of a Court Order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payment (subject to the limitations of this Section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of support and alimony set forth in the Court Order and, with respect to a division of property, the amount of disposable retired or retainer pay specifically provided for in the Court Order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the Court Order, such payment shall begin not later than ninety (90) days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the Court Order, such payments shall begin not later than ninety days after the date on which the member first becomes entitled to receive retired or retainer pay."

Title 10 Section 1408 (e)(1) provides as follows:

> The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50% of such disposable retired or retainer pay.

STATEMENT OF THE CASE

The Appellant and Respondent were divorced by Decree of Divorce entered on November 12, 1987 in the Third Judicial District Court of Salt Lake County, State of Utah. Paragraph 8 of the Decree of Divorce ordered that each of the parties be awarded one-half of all retirement benefits accrued by the Defendant through his service in the U.S. Army and that one-half of the gross amount of benefit be paid each month to the Respondent, Betty J. Maxwell. (See Addendum) Said Decree of Divorce was entered pursuant to stipulation of the parties.

In or about March of 1988, the Appellant, Otis C. Maxwell, caused the amount of his military retirement pay payable to the Respondent to be reduced to one-half of his "disposable retired or retainer pay" to comply with the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Section 1408, et. seq. On June 28, 1988 the Respondent filed a Motion for an Order to Show Cause which was subsequently heard by the Domestic Commissioner of the Third Judicial District Court. The Domestic Commissioner recommended that the Respondent continue to receive one-half of the disposable retired pay. The Respondent objected on

September 2, 1988 and the Honorable Kenneth Rigtrup, Third District Judge, granted the Respondent's Motion for review and on March 28, 1989 entered an Order requiring the Appellant to initiate an allotment from his military retirement pay that would result in one-half of the gross pay being paid to the Respondent and entering a judgment against the Appellant for the arrearage that had accrued between March of 1988 and January of 1989.

The Appellant seeks relief in this Appeal from the Order of Judge Rigtrup entered on March 28, 1989 requiring that one-half of his gross retirement pay be paid to the Respondent rather than one-half of his disposable retirement pay.

STATEMENT OF FACTS

There was no evidentiary hearing conducted in the proceedings below. The trial Court did make and enter Findings of Fact as part of the Order on plaintiff's Motion for Review of Commissioner's Recommendation on Her Order to Show Cause, entered on March 28, 1989. [hereafter "The Order"][See Addendum]

The Court found that a stipulated divorce was entered into between the parties on November 12, 1987 (Paragraph 1 of the Order) and that each party was awarded one-half of the defendant's gross monthly retirement benefit from the Army, including cost of living increases. (Paragraph 2 of the Order)

SUMMARY OF THE ARGUMENT

I. The Uniformed Services Former Spouses Protection Act grants State Courts the authority to treat only disposable retired pay, not total retired pay, as marital property.

II. The Uniformed Services Former Spouses Protection Act does not provide for a waiver of it's provisions by a member or former member of the military.

ARGUMENT

I.

THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT GRANTS STATE COURTS THE AUTHORITY TO TREAT ONLY DISPOSABLE RETIRED PAY, NOT TOTAL RETIRED PAY, AS MARITAL PROPERTY

In direct response to McCarty vs. McCarty, 453 U.S. 210 (1981), which held that federal law as it then existed completely preempted the application of state community property lot to military retirement pay, Congress enacted the Uniformed Services Former Spouses Protection Act (hereinafter "the Act") 10 U.S.C. Section 1408, which authorizes state courts to treat as community or marital property "disposable retired or retainer pay," [Section 1408 (c)(1)], specifically defining such pay to exclude amounts which are required by law to be and are deducted from the retired or retainer pay of such member, including federal employment taxes, and amounts waived in order to receive compensation under Title 5 or Title 38, and amounts that are properly

withheld for federal, state or local income tax purposes. [See Section 1408 (a)(4)(B)(C)].

Since the passage of the Act, many state courts have had the occasion to interpret the provisions of the Act and it has been generally held that the only power a state court has to subject military retirement pay to the terms of a decree of divorce, dissolution or annulment are those conferred by the federal statute, 10 U.S.C. Section 1408. Harris vs. Harris, 670 S.W.2d 171 (Mo. App. 1984). While there have been some questions concerning the preemptive nature of the Act, that issue appears to have been recently settled in the case of Mansell vs. Mansell, 490 U.S. _____, 104 L. Ed. 2nd 675, 109 S. Ct. _____, decided by the United States Supreme Court on May 30, 1989. In that case, a pre-McCarty property settlement agreement between the parties provided that the Appellant would pay Appellee 50% of his total military retirement pay, including that portion of such pay which he had waived in order to receive military disability benefits. After the Act's passage the Superior Court denied the Appellant's request to modify the Divorce Decree by removing the provision requiring him to share his total retirement pay with the Appellee. The State Court of Appeal affirmed, rejecting Appellant's contention that the Act precluded the lower court from treating as community property the military retirement pay Appellant had waived

to receive disability benefits. The U.S. Supreme Court reversed the state court, holding that the Act does not grant state courts the power to treat, as property divisible upon divorce, military retirement pay waived by the retiree in order to receive Veteran's disability benefits. The Court stated that the Act's plain and precise language established that Section 1408 (c)(1) grants state courts the authority to treat only disposable retired pay, not total retired pay, as community property.

The Utah Court of Appeals recently had occasion to consider a case dealing with the Uniformed Services Former Spouses Protection Act. In Greene vs. Greene, 751 P. 2d 827 (Utah App. 1988), the trial court had ruled that the award to the plaintiff of defendant's military retirement was property and the plaintiff was entitled to one-half of defendant's net rather than gross retirement pay. The defendant-appellant contended on appeal that the trial court had erred in changing the Divorce Decree to provide that plaintiff receive one-half of defendant's net instead of gross pay, claiming that the court had amended the Decree and could not do so without a finding of changed circumstances or other compelling reasons. The Utah Court of Appeals rejected this argument, stating:

> "The attorneys for the parties agreed during the trial court hearing that federal law prohibited plaintiff from receiving one-half of defendant's gross military retirement benefits. We find that the courts change in the Decree to provide that plaintiff

> receive one-half of defendant's net retirement benefits, as mandated by federal law, was simply correction of a mistake and was not an amendment or a modification of the Decree necessitating a finding of a substantial change in circumstances." At 829-830.

Other jurisdictions considering the issue of whether the gross retirement pay may be divided under state community or marital property law have likewise held that the Act grants state courts the authority to treat only disposable retired pay as community or marital property. See Rose vs. Rose, 483 So. 2d 181 (La. App., 2d Cir. 1986).

In the case on appeal before this court, the Appellant, Otis C. Maxwell, is a former member of the military entitled to retirement benefits and who has also executed a waiver in order to receive disability benefits. It is the Appellant's position that the trial judge erred as a matter of law, by ordering the Appellant to pay one-half of his gross military retirement pay to the respondent. Because the resolution of this case depends entirely on questions of law, this court need not accord any particular deference to the rulings of the trial judge in the proceedings below. See Scharf vs. BMG Corp., 700 P. 2d 1068, 1070 (Utah 1985).

The recent ruling of the U.S. Supreme Court in Mansell vs. Mansell, supra, makes it clear that the Act is preemptive on this specific issue of disposable vs. gross retired pay and that state courts are prohibited by federal law from treating total retired pay as community or marital

property. The Order of the court entered on March 28, 1989 was therefore contrary to law and should be reversed.

II.

THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT DOES NOT PROVIDE FOR A WAIVER OF IT'S PROVISIONS BY A MEMBER OR FORMER MEMBER OF THE MILITARY

The Uniformed Services Former Spouses Protection Act does not contain any provision allowing a member or former member of the military to waive, knowingly or unknowingly, any of the provisions of the Act. While a Decree of Divorce in this case (See Addendum) was entered after the effective date of the Act, there is no indication in the Decree that the Appellant knowingly or intentionally waived his rights under Section 1408 (e)(1) of the Act. In Greene vs. Greene, supra, the original stipulation entered into by the parties in that case also provided that the defendant was ordered to pay:

> "...pursuant to 10 U.S.C. Section 1408 of the Uniformed Services Former Spouses Protection Act, one-half of the USAF retired gross pay..." At 827

As noted previously in the Greene case, the Utah Court of Appeals viewed the trial court's amendment of that provision to provide that the plaintiff receive one-half of net retirement benefits rather than gross retirement benefits as "correction of a mistake", not an amendment or modification requiring a finding of a substantial change in circumstances. Similiarly, in this case, the provision in the

Decree of Divorce providing for payment of one-half of gross benefits must be viewed as a mistake since federal law clearly mandates that only "disposable" retired pay is subject to division and because there is no evidence that the Appellant knowingly and specifically waived his rights under the Act. See Morgan vs. Quail Brook Condominium Company, 706 P. 2d 573, 578 (Utah 1985); Kinsman vs. Kinsman, 748 P. 2d 210 (Utah App. 1988). Unlike Greene vs. Greene, supra, the Act is not even mentioned in the Decree of Divorce in this case. (See Addendum)

Therefore, the Decree of Divorce in this case should be corrected to provide that one-half of Appellant's disposable retired pay, as defined by the Act, should be payable to the respondent.

CONCLUSION

The court below committed error by ruling that Appellant was required to pay one-half of his gross military retirement pay to the respondent. This error should be corrected by this Court and the judgment for the arrearage entered against the Appellant in the proceedings below should be vacated.

DATED this _____ day of _____, 1989.

RESPECTFULLY SUBMITTED,

FRANKLIN L. SLAUGH
Attorney for the Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Brief of Appellant to the Respondent, Betty J. Maxwell, postage pre-paid, at her last known address of 1817 West 3650 South, #4, Salt Lake City, Utah 84119 this _____ day of _____, 1989.

_____

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BETTY J. MAXWELL, Plaintiff, v. OTIS C. MAXWELL, Defendant.	BK 213 No 5595 10-13-87 3:25 P.M. **DECREE OF DIVORCE** Civil No. D87-2639 Judge Kenneth Rigtrup

THE ABOVE captioned matter came on for hearing before the Honorable Judge Kenneth Rigtrup in his courtroom on the 2nd day of October, 1987, at the hour of 10:00 a.m.

Counsel for the plaintiff indicated to the court that both parties and their counsel had just appeared before the courts Commissioner for Domestic Matters, and had at that time, read into the record a stipulation dispositive of all issues, and that one of the provisions of said stipulation was that the default of the defendant could be entered and that the matter could go forward on an uncontested or default basis.

Having noted that the waiting period prescribed by statute had passed and based on the representations of counsel for the plaintiff, the court did proceed to take testimony from the plaintiff concerning jurisdiction, grounds and other matters of interest to the court.

Having noted that counsel for plaintiff has prepared this decree of divorce and that counsel for the defendant, Martin Pezely, has approved the same as fairly reflecting the stipulation of the parties entered into before the courts Commissioner as referred to above, the court now adopts the stipulation of the parties as outlined herein and having previously published its findings of fact now makes the following order, judgment and decree.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff is hereby awarded a decree of divorce from the defendant, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon the signing and entry hereof.

2. The court orders that the plaintiff be awarded the care, custody and control of the parties minor children, namely Brian, age 17 and Abigail, age 9.

3. The court further orders that the defendant be awarded reasonable and liberal rights of visitation with the minor children of the parties.

4. The court orders, based on the stipulation of the parties, and not based on the income of the defendant as of the time of the stipulation, that the defendant pay to the plaintiff the sum of $300.00 per child, per month, for a total monthly child support obligation of $600.00 per month, the same to be paid in two equal installments each month, the first due on the

5th and the second due on the 20th of each month, commencing with the month of October, 1987. The court further orders that child support for the minor child, Brian, shall continue until his eighteenth birthday, or he graduates with his regular high school class, whichever occurs later, at which time the child support for the minor child, Abigail, shall increase to the amount of $400.00 per month.

5. The court orders that no alimony should be awarded to either party, and the same is forever barred.

6. The court orders that the plaintiff be awarded all of the right, title and interest of the parties and either of them, in those payments due under that uniform real estate contract used by the parties to sell a home and real estate located at 12066 W. Temple Drive, Morrison, Jefferson County, State of Colorado. Further, that the plaintiff is entitled to all future payments on said note and obligation, free and clear of any claim of the defendant.

7. The court hereby orders that each of the parties is awarded those items of personal property in their possession as of the date of hearing in this matter as their sole and separate property, free and clear of any claim of the other, and subject to any debt(s) thereon. The court specifically orders that the plaintiff be awarded the 1985 Chevrolet Celebrity motor vehicle, subject to any debt thereon.

8. The court orders that each of the parties be awarded one-half of all retirement benefits accrued by the defendant

through his service in the U.S. Army, be they monthly payments or otherwise, and that one-half of said gross amount of benefit paid each month, along with one-half of all other benefits be awarded to the plaintiff, to include all future cost of living or other increases which may be provided. Further, that the defendant is ordered to cooperate fully with the plaintiff for purposes of making any application as needed for the purpose of having said benefit sent directly to the plaintiff.

9. The court orders that the defendant be awarded the tax deduction available for the support of the minor children for federal and state tax reporting purposes, so long as he is current in his child support obligation as described herein and in the amounts described herein as of December 31st of each calender year.

10. The court orders that the defendant cooperate fully with the plaintiff for the purpose of maintaining health and accident insurance coverage on the plaintiff and the parties minor children as it is available to him as a retiree with twenty plus years service in the U.S. Army, including providing all information and signing all forms necessary to process claims. The court further orders that the defendant pay one-half of all medical, dental, orthodontic and optical expenses incurred on behalf of the parties minor children, which said medical insurance and benefits will not pay for.

11. The court orders that each of the parties pay as their sole and separate debts, those debts incurred by them since

the date of their separation.

12. The court orders that each of the parties pay their own costs of court and attorneys fees.

DATED this 12th day of ~~October~~ November, 1987.

Judge Kenneth Rigtrup

ATTEST
H. DIXON HINDLEY
CLERK

Approved:

Martin J. Pezely

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BETTY J. MAXWELL, Plaintiff, v. OTIS C. MAXWELL, Defendant.	**ORDER ON PLAINTIFF'S MOTION FOR REVIEW OF COMMISSIONER'S RECOMMENDATION ON HER ORDER TO SHOW CAUSE** Civil No. D87-2639 Judge Kenneth Rigtrup

THE MATTER of the plaintiff's order to show cause, dated in June, 1988, came on for hearing before the courts Honorable Commissioner for Domestic Matters, Sandra N. Peuler, on August 30th, 1988. Subsequent to that hearing, the plaintiff rejected the recommendation of the Commissioner, and made a motion to this court for review of that recommendation. Plaintiff's motion set forth her position and her cause for rejection of the recommendation of the Commissioner.

Having waited the time prescribed by law, ~~and neither the plaintiff nor the court having received a responsive pleading from the defendant,~~ the plaintiff filed with the court a request for ruling on the plaintiff's motion for review of the Commissioner's ruling.

Having received no request for oral argument as provided for in Rule 2.8 concerning dispositive motions, having reviewed its

K.R. and Defendants' Response, with attachments,
file, including the motion for review, and good cause appearing, the court now grants the plaintiff's motion and makes the following findings and order.

FINDINGS OF FACT

1. The court finds that a stipulated divorce was entered into between the parties on November 12th, 1987.

2. The decree of divorce provided, among other things, for $600.00 per month to be paid to the plaintiff by the defendant as child support. The decree provided no alimony to the plaintiff, but that plaintiff receive all of the interest of the parties in a uniform real estate contract resulting from the sale of a home in Jefferson County, Colorado; and, each party was awarded one-half of the defendant's gross monthly retirement benefit from the Army, including cost of living increases.

3. The parties had been married since April 8th, 1966.

K.R. ~~4. The Greene case relied upon by the defendant does not apply to the facts of this case.~~

CONCLUSION OF LAW

Having published its findings of fact above, the court therefore concludes that there is no legally sufficient basis why the decree of divorce in this matter should be modified. Therefore, the recommendation of the Commissioner should not be followed. Consistent with this conclusion of law, the court makes the following:

ORDER, JUDGMENT AND DECREE

1. Plaintiff is awarded judgment against the defendant for the amount of $40.00 for the increase in retirement benefits for the months of January and February, 1988, unless said amounts have been paid in the intervening period.

2. Plaintiff is awarded further judgment against the defendant in the amount of $1,419.00 for her one-half share of the tax deduction from defendant's retirement pay of $129.00 per month for the months of March, 1988 through January, 1989.

3. The defendant is hereby ordered to initiate and complete KR an allotment payable to Plaintiff from ~~that process necessary to amend~~ the military retirement benefits payable to him, so as to cause one-half of all deductions made from his retirement benefits KR paid to Plaintiff, so that none of the deductions from his military retirement benefits come out of the plaintiff's one-half share of his gross retirement benefits. Until said allotment becomes effective, defendant shall pay to the plaintiff directly her one-half of said deduction or withholdings from retirement pay commencing with the month of February, 1989.

4. Plaintiff is awarded her taxable costs of court and attorney's fees in amounts to be determined by the court as follows:

A. Costs in the amount of $9.50;

B. Attorney's fees in the amount of $450.00.

These costs of court and attorney's fees are supported by the affidavit of plaintiff's counsel submitted in connection with this order, and the court makes the award of these costs and fees having given defendant's counsel 15 days in which to object to the affidavit of the plaintiff concerning costs and fees, and ~~Having~~ KR Defendant's

KR objection having been made to the award of any fee, nut the amount thereof. ~~received no objection thereto.~~

DATED this 28th day of ~~February~~ March, 1989.

Kenneth Rigtrup

Judge Kenneth Rigtrup

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing to attorney for defendant, Martin J. Pezely, at 23 Maple Street, Midvale, Utah 84047, postage prepaid, on this 8th day of February, 1989.

Deborah M. Walton, Secretary